Chapter Two: Does It Help to Define Our Dangers From Terrorism As "War"?

For a coherent, long-term strategy of dealing with terrorism after September 11, we need goals that will elicit support at home and abroad over the long term, goals that are clear enough to give some direction to the actions we take and define the capacities we should be building. Governmental goals are always a mixture of activities and objectives designed to meet a demanding need, an awareness of the limitations posed by a variety of costs, and expressive themes that relate the need and the means to widely shared motivations, thereby justifying and inspiring the undertaking.

An expressive theme is not enough. A goal and the strategy needed to implement it must be intimately related to the problem or need that requires governmental response; it requires more critical thought than simply the announcement of a public theme like "making war on terrorism." "War" is neither a persuasive description of the situation we face nor an adequate statement of our objectives. It misleads us as to the means that we will have to use. It provides undeserved dignity to our opponents. Yet we have not been given a better description of our goals.

A. War as a Description of the Situation We Confront

Surprisingly, the term "war" is without real definition in either the law of the United States or the law of nations. In the last half-century declarations of war have become obsolete – despite major hostilities in Korea, Vietnam, Kuwait/Iraq, and Afghanistan. There has been an increasing international tendency to prohibit war as an instrument of policy. Section 2 of the Charter of the United Nations forbids "the threat or

use of force against the territorial integrity or political independence of any state."[i] The treaties providing protection of prisoners and other victims of "war" substitute other terms for situations in which military force is used by nations. The Geneva Conventions, specifying the rules of armed conflict, apply not only "to all cases of declared war" but as well to "any other armed conflict" between parties.[ii]

In the law of the United States, the powers and other legal consequences that accompany a finding of "war" have determined judicial interpretation of what "war" means. It means different things in different contexts. During the Korean War, the Supreme Court denied President Truman the powers of a wartime commander to seize the steel mills.[iii] At the same time, the Court of Military Appeals found that there was a "war" for purposes of increasing the penalty when a sentry slept on duty.[iv] It may well be that the situation after September 11, legally justifies military tribunals to try members of Al Qaeda arrested in Pakistan but is too far from war to allow their use against an American arrested in Chicago.

With the minor exception of some ambiguity about the status of our conflict with the Barbary pirates early in the 1800s,[v] "war" has always required a conflict between nation-states. But we have used "war" metaphorically to indicate any relatively massive commitment of attention, energy, and resources to a dangerous problem. Thus we have committed ourselves, in the last half-century, to "wars" on poverty, crime, and drugs.

Real wars had many characteristics that even the "war on drugs" lacked. They presented overriding national objectives compared to any other domestic and foreign policy. They were led institutionally by the military, which had the central burden of responsibility. They were against a nation, which could draft soldiers and raise revenues

and thus activate far greater resources than even the largest drug cartel. The enemy's objective required it to defeat our military, so often the stakes included the danger of our falling under foreign control. Such a danger was too massive and too pressing for governance with normal separation of powers. The commander-in-chief's vision had to be respected; national disagreement about means was too risky, and delay for legislative or public debate, too costly.

Perhaps most important, modern wars have always been temporary states – not states of prolonged, even indefinite, duration. Only that limited duration would permit a national domestic and foreign policy with a single overriding objective. Only a limited duration would permit the safe transfer of massive powers into the hands of the executive.

Although these traditional characteristics of the term "war" do not fit comfortably with its use to describe the aftermath of the attacks of September 11, that does not preclude stretching the concept that has desirable consequences. After all, we were attacked by an organization, Al Qaeda, that seemed far larger and far better financed than the terrorist groups we and our allies had faced in the past. It displayed a ruthless willingness to kill American citizens, officials, and military for its purposes. Our responses have to be commensurate with this new degree of danger. We would find it useful to have a term that captured the danger and the need for action we may now face – something an order of magnitude more dangerous than the terrorism we had associated with such events as a handful of gunmen seizing a plane or embassy, or shooting up an airport, or setting off a conventional bomb.

Providing the term "war" as a compact and familiar definition of the entirely novel situation we face after September 11 has been useful for some purposes, yet, as I will show, dangerous in the longer run. It is in these pragmatic terms that we must judge the administration's call to "war." Before we decide to let the term "war" play a big role in shaping our policies, we should compare the uses and dangers of this description of our situation after September 11 with another description: that we now face a far wider and sometimes far more dangerous range of terrorist threats than we had previously been prepared to address.

We have, in fact, discovered that there is a set of quite different activities that could be arrayed under the traditional term "terrorism." The activities range from (a) attention-getting but purposely limited violence by a small group; to (b) a continuing campaign of such violence, such as France had experienced in 1985 and 1995 and as has characterized the attacks on Israel at the beginning of the 21st century; to (c) the relatively spectacular attempts to kill many Americans we have experienced in Lebanon, Saudi Arabia, Kenya and Tanzania, Oklahoma City, Washington, and New York; and finally (d) to the danger of terrorists' use of weapons of mass destruction that would increase the risk to life by another order of magnitude over the vast increase that came at "(c)" with the mere objective of massive killing. That set of forms of terrorism creates a complicated mix.

Emphasizing the rich variety of terrorism we face, rather than assimilating it all into a single category with which we are at "war," does not amount to arguing that our criminal law system, which was more than adequate to deal with small groups of terrorists in the United States, is adequate to handle Al Qaeda without the help of

intelligence, foreign policy, and the military. Both descriptions of what we face recognize the need for a fuller range of capacities to deal with a more and more dangerous range of terrorism. The choice between them is pragmatic: is describing our new situation simply as "war" as helpful as acknowledging that it is a set of dangers, some of which are very serious but none of which is much like "war" in its demands on our energies and ingenuity?

Since the choice of how to define our situation is pragmatic, it is not helpful to argue as to what we can and should do from the *assumption* that we are at war. Whether we are "at war" or challenged by a new array of terrorist tactics and groups is a question of choice. We can and must decide how to define the situation.

B. Our Goals and Strategy Must Reflect the Complexity and the Uncertainty of the Threat

Our relatively traditional form of war against the Taliban government of Afghanistan ended when the Taliban were replaced by a friendly, allied government. The same was true of our war against Iraq's regime headed by Saddam Hussein. That in each case there was thereafter no nation against whom we were in an armed conflict does not mean that we could not extend the use of the word "war" to describe the continuing risks of terrorism, if that proved more useful than obfuscating. But obfuscation would be inevitable if the administration refused to clarify with whom we were at war. Besides the variety of forms of terrorist attack, we might be dealing with any or all of several enemies, and what we should do also depends on which of these enemies we are addressing.

If the enemy is, as CIA Director George Tenet suggested in 2002,[vi] the remains of a well-organized Al Qaeda, which has trained thousands of terrorist followers, we must

prevent Al Qaeda from finding a home in any nation – a step our military accomplished effectively in Afghanistan. If the enemy is those infected with hostility to the United States in much of the Muslim world (suggested by figures like 95 percent of well-educated Saudis supporting Bin Laden's cause),[vii] our strategy requires a combination of short-term cooperation with foreign intelligence agencies and, equally important, longer-run efforts to create a different attitude toward the United States.

If our enemy is any *state* willing to use terrorists to attack U.S. civilians for political purposes, the threat of a U.S. military response is critical. If it is any private group, however small, willing to attack us in this way, we must recognize that the problem is a little like the problem of drug-dealing; we must try very hard to stop the activity, but also learn that we will have to live with it. Attacking harboring nations will still be important, but it will prove inadequate in light of the sobering fact that terrorist groups, like organized crime groups, have been able to work around the world without the tolerance, let alone support, of the government where they are located.

If our gravest danger flows from the rapid spread to more and smaller groups of the technology for, and willingness to use, weapons of mass destruction, we have to focus on blocking the ways these groups can get their hands on those weapons.[viii]

If the enemy is all those groups using even conventional terrorist tactics against anyone in the world, not necessarily against us – if we really intend a war on all terror or on all terror with a global reach – our response in most cases cannot, realistically, be more than diplomatic support for the victim state.

Each of these possible enemies requires a different strategy. Even the most dangerous, the threat of the spread of weapons of mass destruction to many terrorist

organizations, does not seem particularly responsive to military or war-like measures. Our gravest dangers from nuclear terrorists may well flow from the fact that enriched uranium or even nuclear weapons may be illegally sold or poorly guarded in, say, Russia or Pakistan.[ix] Then the language of "war" would serve us poorly; for what we need is a structure of incentives and prohibitions in cooperation with these countries. The danger from biological and chemical weapons can be greatly increased by ready availability of information about such weapons on the Internet, or the selfishness of pharmaceutical companies.[x] Dealing with these requires multilateral treaties. Again, thinking of ourselves as making "war on terrorism" leads us in the wrong direction. Dealing with these risks requires extensive international cooperation. War does not help.

Turning to the danger from the use of conventional weapons, we might well expect the danger to come not from any single organization like Al Qaeda, against which we can sometimes use the military, but from the desire of very large numbers of individuals in Muslim countries to punish what they see as our indifference or contempt toward them, to deflate our pride and grandeur, and to reduce awe at our power by showing that we are vulnerable to terrorist attacks. Defeating the armies of the Taliban and Saddam Hussein may aggravate this threat.

With appeals to those hopes, Bin Laden may have wanted, above all else, to unite under his leadership a significant fraction of the Muslim population, making it a force to be reckoned with. The polls show an extraordinary breadth of such feelings within Arab populations and even beyond (in areas where religion has nothing to do with the motivation);[xi] the waiting line to be a Palestinian suicide bomber shows the depth and

breadth of commitment at the bulging extreme of the very broad spectrum of levels of support.

If this is true, then Bin Laden would be only one of many who could fan those feelings into flamboyant terrorism against the United States. In the long and medium terms, we must try to reduce, by explanations or actions, the sea of individuals whose felt grievances led to enthusiasm for Bin Laden's attacks. What our eventual safety would require would be a relatively widespread belief that the Muslim future lies in reformed governments and economies and that those possibilities are in their hands, not blocked, controlled, or frustrated by the United States or its allies in the area. Fostering that belief may involve loosening ties to corrupt allies even though that would be dangerous in the short run. In the medium term we will need to seek as wide agreement as possible that political violence against civilians by anyone – states or their opponents—is so unfair and cruel as to be condemned by most of the world, hoping to reduce support for <u>any</u> cause that relies on political violence against civilians. We must show that attacks on civilians are likely to alienate possible supporters of the attackers' goals, and are unlikely to affect in any major way U.S. policies or the economic, political, and military stature of the United States.[xii]

Indeed, figuring out the extent of the danger – not just its source or the form it takes – is important if we are to decide what must be "paid" for security. To assess the extent of danger we must divide the risks we face from terrorism, whatever their source or motivation, into the four separate categories already described: the terrible risk of terrorist attack with a biological or nuclear weapon; the grave risk of large-scale, spectacular attacks with "conventional" weapons as on September 11; the demoralization

a prolonged campaign of small-scale attacks can cause; and the far more familiar, less dangerous, forms of attack such as were common in Israel before the intifada and were once common in Northern Ireland. We must be prepared to spend more and plan more comprehensively to deal with the more dangerous forms of attack, where the cost to us might be thousands of times the cost of a familiar terrorist attack. But if they are all part of the same "war" against the same enemy ("terrorism with a global reach"), we are less likely to develop different remedies for different dangers.

The other reason for making distinctions in the source and scope of the danger is so we can be realistic about success. Because Al Qaeda has in the past spaced its attacks many months apart, we should not quickly assume that anything we did prevented a prompt repeat of the last attack. But preventing massive attacks would be an immense success that should not be overlooked even if, like France, Israel, or Northern Ireland, we become the target at home or abroad of a spate of small-scale bombers, many of whom may be suicidal. A suicide bomber bypassing the streets of Jerusalem for the streets of Los Angeles should not be treated like a threat of immense proportions, and his success in causing casualties should not be considered a defeat for our homeland defense. Above all, it should not be treated as a heartening triumph for terrorism. That would make heroes of the terrorists, greatly encourage terrorism, and cause needless disruption of our national life and confidence.

In short, each of four or more opponents is our possible enemy and each of these could engage in traditional terrorism, or a campaign of terrorism, or spectacular terrorism, or an effort to use weapons of mass destruction. To talk of "war" without recognizing these variations merely obscures the problem.

Worse, talk about "war" also obscures the level of our uncertainty about the threat we face or are likely to face. Speaking of a "war" initiated by terrorists on September 11 suggests that we somehow know the enemy and the scope of the danger he poses. In fact, one of the critical, defining characteristics of the situation we now face is its very uncertainty. A large part of our problem is how to prepare intelligently despite our uncertainty about the terrorist's motivations, organization, resources, and plans.

The American people are wise enough to recognize that, until we know more, it is sensible for a wealthy, powerful country to assume the worst even while knowing that our enemies may not be as numerous, organized, or competent as we fear. The American people recognize that we still don't know how many people willing and ready to take terrorist actions are out there; how professionally they are organized and managed; and whether they are generally as capable as the attacks on September 11 suggested or as clumsy as Richard Reid's attempt to set off his shoe bomb was. Until we start to learn more, we must be more open to change than a suggestion that we are at "war" with an identified enemy – terrorism with an international reach – suggests.

These pragmatic weaknesses in the use of "war" to describe our choices and to sustain our efforts are supplemented by the benefits the concept can offer our opponents. An undefined war on terrorism will look like a return of the Crusades to many Muslims.[xiii] Even if it is plainly addressed to a particular organization, Al Qaeda, it grants that organization the dignity of parity with the United States and spares it the condemnation that the terms "terrorism" and "crime" evoke. There is something heroic about being at war with the world's only superpower, as the Arabic coverage of the Iraq

war showed. Members of the IRA starved themselves to death to press their demands that they be treated as prisoners of "war" rather than as common criminals.[xiv]

C. "War" And The Dangers of Reliance on the Wrong Resources

Finally, a definition of the situation we face as "war" strongly suggests that our primary reliance will continue to be on military force, even after our military victories in Afghanistan and Iraq. If use of the military was in fact the most promising avenue to deal with the variety of forms of terrorism that threaten us, there would be nothing affirmatively misleading (although nothing very helpful) about describing the situation we face as "war." The danger is that, for several reasons, the use of the term "war" points us in the wrong direction. The very term suggests a primacy for military force; that's what war has always been about. The military is the group to whom we have generally turned in situations of grave danger from hostile forces. In that sense, we may be captives of the dictum that "to a man with a hammer, everything looks like a nail." Finally, the military, recognizing the vulnerabilities of its traditional strategies for fighting wars to what it calls "asymmetrical threats," has invested its pride in efforts to meet such low-level threats. But a little thought reveals sharp limits on the usefulness of military force against terrorists sheltered by a sympathetic population or even against a state harboring terrorists.

Ultimately, success against secretive, violent terrorist groups requires either denying all who *might* fit into this category access to targets and the resources they need for particular attacks (for example, fissile materials), or identifying the potential terrorists in advance and blocking their plans in any of a variety of ways from arrest or detention of the suspects to disruption or frustration of their actions by asset-freezing or seizure.

Either of these ways of preventing terrorism can take place within the United States or abroad, and can be carried out either by Americans or by officials of a friendly nation. In this complex of possibilities, the military has an important but distinctly limited role.

Abroad, the military should and will provide much of the protection against terrorist attacks on U.S. installations. U.S. citizens abroad will necessarily continue to rely, for ordinary policing, on foreign police forces. The critical activity abroad, where terrorist groups can hope to plan, recruit, supply, and finance their operations against the U.S. mainland more safely than they could within U.S. borders, is intelligence gathering. That requires human sources, and close-in electronic and physical surveillance, not advanced military technology. The critical capacities – ability to recruit agents that not only can speak the language, but can also pass easily in the communities that terrorists share with supporters – are largely in the hands of foreign intelligence agencies and our CIA. Building a separate military capability here is hard to justify.

Our military capacities may well be critical in reminding other nations of the lessons of Afghanistan under the Taliban and Iraq under Hussein. We will not tolerate a hostile nation providing even a haven to a group planning, training, financing, or providing needed resources for attacks on the United States or its people and property abroad. We will not risk a hostile nation delivering weapons of mass destruction to terrorists. We can even try to impose a requirement of cooperation by broadening our threat to include states that fail to cooperate in good faith with our efforts to find and disable such groups or disable such activities.

But even in this area, there are distinct limits to what the military can accomplish. Some states will lack the competence to really help and other states that do not believe in

our cause or fear terrorist retaliation will make efforts too half-hearted to be effective but real enough to be indistinguishable from unpunishable incompetence. Both may remind us that we were unable to detect terrorist preparations in the United States that went on for years before September 11, and that Britain, France, Germany, and Italy have all had similar problems. There's the rub. What will we do when a state where terrorists may be planning attacks on us claims it cannot find them or when a state with weapons of mass destruction or needed technology or ingredients loses count or control of them?[xv] For then any attack will threaten the continued support of our coalition and cause widespread suspicion of injustice within the United States.

To assure good faith and to create competent local law enforcement, we could demand access for our investigators or even military forces to conduct law enforcement operations in such places as Iran, Syria, Libya, Sudan, or Somalia, but these states are not likely to agree to that sacrifice of sovereignty. Even Saudi Arabia would not allow the FBI to freely investigate the bombing of the Khobar Towers.[xvi] Even if all agreed, the capacity of U.S. soldiers or investigators to find terrorists in an unfriendly setting, without taking over the country, is likely to be very low indeed. Our experience pursuing Al Qaeda leaders in Afghanistan is not heartening.

How serious is this problem – this limit to our effective reach? That depends on how many of the terrorist organizations that threaten our security depend upon relatively open tolerance by the states where they prepare for terrorism and how many can operate at a lower, far less conspicuous, level of support. One possibility is that the group's preparations for terrorism require the active support or at least the open tolerance of a particular state. That is, it may need relatively open havens for recruiting, supplying, and

planning and maybe additional state resources. A second possibility – suggested by the history of the IRA or the Basque ETA or Colombia's FARC terrorists – is that the terrorist group works more like organized crime; i.e., that it is not willingly tolerated by the state where it is found, but is able to operate (and cooperate with other such groups) through secrecy, corruption, and intimidation.

Even for terrorist organizations in the first category, where state support or tolerance is now available and open, the threat of war with the United States and other states that align themselves with us, or of extreme economic sanctions, may not cut off what the organization needs. First, the support may continue but in a more carefully concealed form, as many believe happened after we bombed Libya in 1985 in retaliation for its terrorism against U.S. soldiers in Berlin. Similarly, we suspected, but could not prove until after the fall of the Communist states in Eastern Europe, that they were providing support for various terrorist groups in the West. Second, the terrorist organization whose support by one state is withdrawn may find alternative support in another state that is unrelentingly hostile to the United States and prepared to bear the consequences. Finally, some terrorist organizations now working with the support or tolerance of a state can and will shift into the second "organized crime" category, operating without state support.

Terrorist organizations that operate like organized crime groups without the support or willing tolerance of a state can be affected by U.S. efforts only in two situations. First, the United States can insist on helping the unwilling host to create the capability to deal with any terrorist group using its territory to prepare for terrorism abroad. Looking at our attempts to improve the state capability to fight drug lords in

places such as Mexico and Colombia does not provide great reassurance. There are some successes but many failures. Alternatively, the United States can go in with its own forces and try to deal with a terrorist group that is not actively supported or openly tolerated by a state but cannot be controlled it. But that would be taken as a frightening invasion of sovereignty.

After action against Afghanistan, then, the prospects are limited of substantial results from military threats or actions to reduce terrorism rooted in a state too incompetent, or unenthusiastic to pursue the terrorists – perhaps because they do not threaten its own territory. Open support or toleration by a state and any advantages to a terrorist group that depends on such open acceptance can be denied by threat of force or economic sanctions. But what will remain, unless hearts and minds are converted, are secret support and toleration, often hidden behind a claim of lack of capacity to find the group or detect its preparations. And we have no military remedy for these. Nor is the prospect of direct military attack on terrorists hidden in a sympathetic population much better without recourse to unacceptable repression.

In the end, we need a level of willing and competent cooperation abroad that we cannot effectively compel. That limits the usefulness of military force and requires persuasion and developing partnerships at the working level – a lesson the Israelis have now learned painfully. Our objective has to be a new international norm against terrorism that is broadly and sincerely based, not because international norms are gentler and fuzzier then missiles and bullets but because only dedicated host-nation cooperation will work.

The limited role of the military is even clearer when we are considering the activities at home designed for the same two purposes: to restrict access to targets and dangerous resources to those whose access is not dangerous; and to gather intelligence about those who may be dangerous so that we can monitor and then disrupt their plans. We do not need the military to replace the Secret Service and the Department of Homeland Security or to protect the Congress. Within the United States we do not need the military to guard most facilities that are likely to be targets of terrorist attacks, nor do we need the military to gather the secrets that can disarm dangerous terrorists and defeat their plans.

In fact, we have a tradition going back well over a century of keeping the military out of domestic law enforcement, both because it is trained for war and not policing, and because we fear the centralization of power that would come with domestic control managed by the Commander in Chief or the Secretary of Defense. We also have a tradition since the 1970s of keeping the Defense Department out of intelligence-gathering about domestic activities, and that tradition has served well both the military (by preserving public respect) and the public (by providing more confidence in the privacy of political activities).

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[i] UN Charter, art. 2, para. 4.
[ii] United Nations. Treaty Series. "Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949," art. 2, *Treaties and International Agreements Registered or Filed and Reported with the Secretariat of the United Nations*, 75, no. 972 (1950).
[iii] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[iv] U.S. v. Hurst, 6 C.M.R. 307 (A.B.R. 1952).
[v] Johnny H. Killian and George A. Costello, eds., *The Constitution of the United States of America: Analysis and Interpretation: Annotations of Cases Decided by the Supreme Court of the United States to June 29, 1992* (Washington, D.C.: U.S. Government Printing Office [U.S. GPO] 1996), p. 309.
[vi] James Risen, "A Nation Challenged: The Threat; Qaeda Still Able to Strike the U.S., Head of C.I.A. Says," *New York Times*, February 7, 2002, p.A1.
[vii] Elaine Sciolino, "Don't Weaken Arafat, Saudi Warns Bush," *New York Times*, January 27, 2002, p.A1.

[viii] For discussion of the availability of weapons of mass destruction (WMD) and an outline for a plan on how to deal with terrorists' use of WMD, *see* Graham Allison and Andrei Kokoshin. "The New Containment: An Alliance against Nuclear Terrorism." *National Interest* 69 (Fall 2002): 35-43; Ashton B. Carter, Testimony before the Senate Committee on Armed Forces, *Arms Control & Nuclear Terrorism: A Global Coalition Against Catastrophic Terrorism*, August 1, 2002, *available at* http://www.senate.gov/~armed_services/statemnt/2002/August/Carter.pdf; Richard Lugar and Sam Nunn, "Connecting the Dots on Nuclear, Biological, and Chemical Terrorism: The Clear Danger and the Imperative of a Global Coalition Response," *Report on a Conference Sponsored by The Nuclear Threat Initiative (NTI) Moscow*, May 27, 2002, *available at*: http://lugar.senate.gov/052702a.html.

[ix] Allison & Kokoshin, "The New Containment".

[x] See, for example, Herbert Krosney, *Deadly Business: Legal Deals and Outlaw Weapons: The Arming of Iran and Iraq, 1975 to the Present* (New York: Four Walls Eight Windows 1993).

[xi] The PEW Research Center for People and the Press. "What the World Thinks in 2002: How Global Publics View: Their Lives, Their Countries, The World, America," Released: December 4, 2002 http://people-press.org/reports/display.php3?ReportID=165.

[xii] Ariel Merari, "Suicide Terrorism," *Invited Lecture Delivered at the APA Convention,* Chicago, Aug. 2002.

[xiii] Even talk of use of force by the United States looks like a Crusade to some Muslims. See Safar Bin Abd Al-Rahman Al-Hawali, "Open Letter to President George W. Bush," *available at* http://www.muslimuzbekistan.com/eng/ennews/2001/10/ennews20102001.html.

[xiv] "An I.R.A. Prisoner Dies in Belfast on the 61st Day of Hunger Strike," *New York Times*, July 8, 1981, p. A4; Dennis Kennedy, "Of Britain and Ireland," *New York Times*, May 20, 1981, p. A31; "Around the World; I.R.A. Prisoners in Ulster to Begin a Hunger Strike," *New York Times*, October 27, 1980, p.A7.

[xv] Bayan Rahman, "Japan fails to account for plutonium," *Financial Times*, January 29, 2003.

[xvi] Pierre Thomas, "Saudis Investigate Car as Getaway Vehicle; Freeh Presses for Greater Access in Bomb Probe," *Washington Post*, July 15, 1996, p. A13.